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MAY 27 2005

## UNITED STATES BANKRUPTCY COURT

## EASTERN DISTRICT OF CALIFORNIA

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EASTERN DISTRICT OF CALIFORNIA

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4 In re: ) Case No. 04-26169-C-11  
5 INDIAN SPRINGS VINEYARDS, ) DC No. SPB-1  
6 )  
7 Debtor(s). )

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

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9 These findings of fact and conclusions of law address the  
10 request of Abundant Real Estate, Inc. ("ARE") for payment of real  
11 estate commissions as an administrative claim to be paid out of  
12 escrow of certain real property. Proceedings were held on April  
13 19, 2005, April 26, 2005, and May 24, 2005. The material facts are  
14 not in dispute. Accordingly, no trial-type hearing is necessary.  
15 Moreover, the parties have agreed to admission of evidence without  
16 live testimony and cross-examination.

FINDINGS OF FACT

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19 This chapter 11 bankruptcy case was filed on June 15, 2004, by  
20 Indian Springs Vineyards. Indian Springs Vineyards was attempting  
21 to reorganize its business, which involved the operation of a  
22 vineyard property of approximately 446 acres, in which  
23 approximately 225 acres were in grape production located at 16110  
24 Indian Springs Road, Penn Valley, CA 95946.

25 At the time the bankruptcy case was filed, the book value of  
26 the property was scheduled in the bankruptcy schedules at  
27 \$5,530,100.00, subject to secured claims totaling \$7,907,390.23.  
28 The principal secured creditors were Aegon USA Realty Advisors,  
Inc. ("Aegon"), which was listed with having a disputed secured -

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1 claim of \$3,898,750.23, and Premier West Bank, having a disputed  
2 secured claim of \$4,008,640.00.

3 The debtor operated as a debtor in possession.

4 As is typical in this type of chapter 11 reorganization case,  
5 the debtor's strategy was to attempt to continue operating the  
6 business while looking for a solution in the form of a purchaser  
7 who could rescue the situation or some other means of mollifying  
8 the creditors whose pressure precipitated the filing.

9 There was extensive litigation from the outset among the  
10 debtor and the secured creditors, particularly Premier West Bank,  
11 in which the creditors were reluctant to permit the 2004 grape crop  
12 to be cultivated and harvested (with limited exceptions).

13 As part of the debtor's strategy, the managing partner of the  
14 debtor in possession, Dennis Ball, executed a Non-Residential,  
15 Residential Income and Vacant Land Listing Agreement with ARE with  
16 an exclusive listing agreement to begin on July 2, 2004, and to end  
17 at 11:59 p.m. on August 2, 2004, at a price of \$12,000,000.00 with  
18 compensation to the broker at 6 percent.

19 The agreement provided that the listing would not be entered  
20 in the multiple listing service and that no for sale or sold sign  
21 could be placed on the property.

22 On July 15, 2004, there was filed an ex parte application to  
23 employ ARE. The application referred to 11 U.S.C. § 327 and  
24 Federal Rule of Bankruptcy Procedure 2014. The parties agreed to a  
25 6 percent commission fee and reported that "ARE understands that  
26 its compensation is subject to court approval and may be changed by  
27 the Court." The relief sought was to "employ Abundant Real Estate,  
28 Inc. as a professional pursuant to 11 U.S.C. section 327 to assist

1 the Debtor and this bankruptcy estate in the listing, marketing,  
2 and possibly selling of the Property pursuant to the terms set  
3 forth in this Application." The application to employ did not make  
4 any reference to 11 U.S.C. § 328.

5 In support of the application, there was filed a declaration  
6 of Yolanda MacDonald representing that she is an independent real  
7 estate agent, employed with ARE and that she had agreed to provide  
8 services on behalf of ARE for a 6 percent commission. She also  
9 stated in her declaration that:

10 I believe the rate of commission requested by ARE in this  
11 proceeding is reasonable and comparable to other commission  
12 fees charged and paid, if not less, in this local area for the  
13 sale of residential real property. I understand that any  
14 commission fee paid to ARE is subject to Court approval and  
15 change.

16 Declaration of Yolanda MacDonald at page 1, line 27, through page  
17 2, line 3 (emphasis supplied).

18 There was also filed in support of the application a  
19 declaration of Dennis Ball asserting that it was appropriate to  
20 "list, market and possibly sell" the vineyard property. He also  
21 declared that "ARE has been informed that its commission fee is  
22 subject to prior Court approval and may be modified by the Court."  
23 Declaration of Dennis Ball at page 2. Neither the declaration of  
24 Ms. MacDonald nor Mr. Ball refers to § 328.

25 On July 16, 2004, this court signed and entered an order on  
26 the application to employ real estate broker, which order was  
27 prepared by counsel for Indian Springs Vineyards, and which stated  
28 that "the Debtor is authorized to employ Advantage [sic] Real  
Estate, Inc. as real estate professionals for the purposes of  
listing, marketing, and selling real property of the estate located

1 at 12600 Indian Springs Road, Penn Valley, California 95946,  
2 pursuant to the terms and conditions set forth in the Application  
3 and supporting declarations of Dennis W. Ball and Yolanda  
4 Macdonald." In addition, that order stated that "all compensation  
5 to be paid to Advantage [sic] Real Estate, Inc. shall be subject to  
6 Court approval, pursuant to 11 U.S.C. sections 328, 330, and 331."

7 On July 20, 2004, Premier West Bank objected to the  
8 application to employ the real estate broker on the basis that the  
9 listing price was so high that it would be unproductive in  
10 generating potential sales and that declining to enter the property  
11 in the multiple listing service would diminish sales potential.

12 On August 2, 2004, ARE and Mr. Ball executed an addendum to  
13 the listing agreement extending the agreement from August 2, 2004,  
14 to September 1, 2004. No court approval was sought or obtained.

15 On July 8, 2004, Ms. MacDonald showed the property to  
16 representatives of Catlin Properties. On July 23, 2004, Ms.  
17 MacDonald delivered a letter of intent from Catlin Properties to  
18 the debtor regarding the purchase of the property. During the  
19 period from July 23, 2004, until March 10, 2005, there was a  
20 considerable amount of litigation activity regarding the operation  
21 and management of the vineyard and an attempt to construct a plan  
22 of reorganization. During that period, Catlin Properties emerged  
23 and disappeared from the scene on multiple occasions. The basic  
24 problem was that the secured creditors were not satisfied that any  
25 transaction that was being proposed to them under various  
26 reorganization options would pay them their secured claims in full.

27 During hearings in the fall of 2004, this court indicated that  
28 the original Catlin Properties proposal, which was substantially in

1 excess of \$7,000,000.00, appeared to be "illusory" in light of  
2 various due diligence periods, conditions, and minimum deposits.

3       Eventually, there was a complex settlement among the secured  
4 parties and the debtor that permitted the closing of a transaction  
5 by which the property would be sold to Catlin Properties for the  
6 sum of \$5,750,000.00. This transaction required that Premier West  
7 Bank agree to reduce its claim by a substantial amount contingent  
8 upon prompt closing of escrow. Specifically, Premier West Bank  
9 would be paid \$2,175,000.00 from the sale escrow no later than  
10 March 10, 2005, and that if payment was not made, Premier West Bank  
11 was not bound by the settlement terms and "could obtains its claims  
12 against the estate." In other words, Premier West Bank was willing  
13 to take a so-called "haircut" of at least \$1,825,000.00 if it was  
14 actually paid by April 25, 2005, otherwise the sale transaction  
15 would collapse and a trustee (either chapter 11 or 7) would be  
16 appointed, with a possible consequence that the business would be  
17 closed and the real property abandoned to the secured creditors.

18       On April 1, 2005, ARE, represented by Stanley Berman, filed a  
19 request for payment of its commission out of the escrow and  
20 asserted that it was entitled to a priority contingent lien that  
21 had to be paid immediately upon closing. Mr. Berman set a hearing  
22 for April 19, 2005, in this court under the court's self-set  
23 calendar rule on this motion SPB-1.

24       On April 18, 2005, Premier West Bank filed an objection to the  
25 request of ARE for payment of administrative claims asserting that  
26 there was no lien available under bankruptcy or nonbankruptcy law  
27 and pointing out that the "settlement" would collapse if the April  
28 25 deadline was not honored.

1 On April 19, 2005, Mr. Berman also asked this court to enjoin  
2 the sale. The court advised Mr. Berman that if ARE wished to  
3 enjoin the sale, it should commence an adversary proceeding.  
4 The hearing on motion SPB-1 was continued to April 26, 2005 (the  
5 day after the sale), at 9:30 a.m.

6 On April 22, 2005, ARE filed an adversary proceeding seeking,  
7 among other things, an order enjoining the close of escrow of the  
8 sale. An emergency hearing was held on April 22, 2005, in  
9 adversary proceeding No. 05-2156, in which there was vigorous  
10 opposition and argument that ARE was attempting to extort something  
11 to which it was not entitled.

12 At the April 22, 2005, hearing, the debtor filed a response in  
13 opposition in which it asserted that, despite this court's  
14 observations at the April 19, 2005, hearing that it had not yet  
15 determined the amount of ARE's commission, ARE had been continuing  
16 to attempt to force payment of \$345,000 from the escrow and raised  
17 numerous other factual points. Also on April 22, Premier West Bank  
18 opposed the effort to obtain an injunction and made clear that the  
19 sale would collapse if it did not occur on schedule.

20 This court denied the request to enjoin the close of escrow  
21 and authorized the sale to close without payment of the broker's  
22 claim or any commission claimed by ARE. This determination was  
23 made without prejudice to any future determination of a claim for  
24 administrative expenses against the bankruptcy estate. The sale  
25 closed as scheduled. On May 3, 2005, ARE dismissed adversary  
26 proceeding No. 05-2156, with prejudice.

27 On May 24, 2005, there came on for hearing ARE's request for  
28 payment of expenses in which ARE contended it was entitled to

1 payment of a 6 percent commission, i.e. \$345,000 (or 6 percent of  
2 \$6,189,503.48 or 6 percent of \$6,474,914.32, both numbers being  
3 drawn from the closing statements) and that under § 328 the amount  
4 could be changed only under the terms prescribed by § 328.

5 The debtor opposed the request for payment of administrative  
6 expenses. At the time of the hearing on May 24, the debtor  
7 presented evidence that Ms. MacDonald devoted no more than 25 hours  
8 to the transaction and that the purchaser was a sophisticated real  
9 estate entity that continually negotiated a complex transaction  
10 directly with the debtor after the listing expired. The debtor  
11 suggested that compensation be on an hourly basis but conceded  
12 during oral argument that a percentage rate of less than 6 percent  
13 may be appropriate.

14 The debtor also presented evidence (it was stipulated that the  
15 declaration evidence could be admitted) that on or about April 20,  
16 2005, counsel for Premier West Bank contacted the debtor's counsel  
17 to report that Premier West Bank had received numerous calls at its  
18 Oregon office from the real estate broker insisting that her  
19 commission should be paid out of the escrow and that counsel for  
20 Premier West Bank had contacted Mr. Berman and voiced his  
21 opposition to such conduct. The court believes this testimonial  
22 evidence.

23 In addition, there was evidence (hearsay admitted without  
24 opposition) that the escrow officer informed counsel for the debtor  
25 on April 21, 2005, that she had received calls from the broker that  
26 "she would obtain a court order to do so." Declaration of Mike K.  
27 Nakagawa, filed May 10, 2005. The court believes this testimonial  
28 evidence.

CONCLUSIONS OF LAW

The first question is whether the 6 percent commission was authorized under § 328(a) in circumstances in which it could only be adjusted under the terms appearing in that section.

This court did not intend its order to invoke § 328 even though § 328 is referred to in the order in a manner that is ambiguous because it also refers to § 330 without referring to the limitations of § 328(a).

Accordingly, this court is not required to honor the 6 percent as a rate of compensation that could be adjusted only under the circumstances specified in that section. (Although there is substantial argument available that the circumstances of the real estate professional launching litigation that threatened to destroy the transaction would satisfy those conditions, the court makes no determination at this time.)

The next question is what compensation is appropriate, all parties agreeing that some compensation is in order. The evidence from Ms. MacDonald's testimony is that 6 percent is an appropriate rate for the sale of "residential real property," a proposition as to which the court has no qualms, although it does with some regularity see employment of real estate professionals at rates of less than 6 percent and is here dealing with nonresidential real property.

It is also a fact that the debtor agreed to a commission of 6 percent and that the debtor's most vigorous creditor, Premier West Bank, while dissatisfied with other aspects of the employment as articulated in its opposition filed after the court signed the order authorizing employment, did not quarrel with the proposed



1 rate of compensation. Accordingly, even though the court is not  
2 required to award 6 percent under § 328, it is persuaded that it  
3 should authorize compensation measured by \$345,000, minus certain  
4 offsets that remain to be determined.

5 Specifically, the activity of ARE in March and April 2005 was,  
6 if not worse, unjustified. ARE visited unnecessary and  
7 inappropriate expense upon parties and the estate that should not  
8 be rewarded. Counsel for secured parties were required to expend  
9 considerable time and expense in rescuing the transaction from the  
10 attempt of the real estate professional to preempt this court's  
11 right to determine administrative compensation and to assert a lien  
12 that is plainly not allowed under applicable law. In the  
13 circumstances of this case, which had dubious reorganization  
14 prospects without the Premier West settlement, ARE seriously  
15 imperiled the transaction, which transaction the court had already  
16 suggested may have been the debtor's last chance before the case  
17 collapsed into liquidation and foreclosures.

18 Accordingly, the court will not be able to make a final  
19 determination of the appropriate administrative expense award for  
20 ARE until counsel for the debtor, for Premier West Bank, and for  
21 Aegon all provide to this court evidence establishing the total  
22 amount of all reasonable fees and expenses that resulted from the  
23 activities of the real estate professional during March, April, and  
24 May (May being in the aftermath of March and April).

25 Those amounts shall be established by way of declarations and  
26 appropriate memoranda explaining the various costs and may include  
27 the expense of preparing such declarations and memoranda. Such  
28 declarations and memoranda shall be filed by June 27, 2005, and

1 oppositions, if any, shall be in writing filed within 15 days  
2 thereafter. Responses, if any, may be counted in the chargeable  
3 expenses, and shall be filed 15 days thereafter. The court shall  
4 conduct oral proceedings only if it believes that there are  
5 material disputes of a evidentiary nature.

6 The court anticipates awarding all such amounts that are  
7 ultimately established (including expenses of litigating fees) as  
8 reasonable as administrative expenses under § 330 (for debtor's  
9 counsel) and under § 503(b)(4) (for creditor's counsel).

10 An appropriate order shall issue.

11 Dated: May 27, 2005.

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UNITED STATES BANKRUPTCY JUDGE  
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**CERTIFICATE OF SERVICE**

On the date indicated below, I served a true and correct copy(ies) of the attached document by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed and by depositing said envelope in the United States mail or by placing said copy(ies) into an interoffice delivery receptacle located in the Clerk's Office.

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Dated: 5/31/05

  
DEPUTY CLERK